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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

INTERNATIONAL RESOURCES, INC.
and LARRY E. SMITH,

Petitioners,

v.

NEW YORK LIFE INSURANCE COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION

I. RESPONDENT DISTORTS THE CASE LAW WHEN IT DENIES THAT THE FEDERAL COURTS ARE IN CONFLICT ON THE ISSUES RAISED IN THE PETITION.

New York Life asserts that "there is no conflict among the circuits" on the threshold issue presented by the Petition, *i.e.*, whether the bare purchase of insurance by a small, closely-held employer should be deemed the establishment of a welfare plan under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* ("ERISA"). (Brief in Oppo-

sition, p.6). Yet the Fifth Circuit has ruled one way on the issue in *Taggart Corp. v. Life and Health Benefits Administration, Inc.*, 617 F.2d 1208 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981), and the Sixth Circuit has ruled the other way in this case. These opposite results have been reached on virtually indistinguishable facts. In the Fifth Circuit, the bare purchase of insurance by a small, closely-held employer does not constitute the establishment of an ERISA plan; in the Sixth Circuit, it now does.

Almost as important as this conflict between the Fifth and Sixth Circuits is the long-perceived conflict between *Taggart* and *Donovan v. Dillingham*, 688 F.2d 1367 (11th Cir. 1982) (en banc). *Donovan* itself established the parameters of this conflict by setting forth "the extent [to which] *Taggart* shall no longer be binding in the Eleventh Circuit." 688 F.2d at 1375. Both the district court and the Sixth Circuit in the present case perceived this conflict to touch upon their decisions here, as they explained they were following the Eleventh Circuit precedent of *Donovan* and rejecting the Fifth Circuit precedent of *Taggart*.[1] The Sixth Circuit said, "We ... find that the *Donovan* court's construction of ERISA is more consistent with the Act's broad scope than *Taggart*." (950 F.2d at 297, Appendix to Petition at 5a). The district court said, "Although *Taggart* has been accepted by other

[1] As Petitioners argued below, the Sixth Circuit could have followed *Taggart* in this case without doing violence to *Donovan*. The converse was not true, however. The Sixth Circuit's application of *Donovan* to the facts of the present case is irreconcilable with the Fifth Circuit's decisions in both *Taggart* and *Gahn v. Allstate Life Ins. Co.*, 926 F.2d 1449 (5th Cir. 1991), discussed below. It is even contrary to the reasoning of *Donovan* itself, as explained at p. 12 of the Petition.

courts for its conclusion as to the ERISA status of multiple employer insurance trusts, . . . it is the *Donovan* analysis which this court finds compelling in the establishment of an ERISA plan by employers." (Appendix to Petition at 43a). Other courts have perceived the same conflict. *E.g.*, *Ed Miniat, Inc. v. Globe Life Ins. Group, Inc.*, 805 F.2d 732, 740 (7th Cir. 1987), *cert. denied*, 482 U.S. 915 (1987) (explaining to what extent "the *Donovan* court rejected *Taggart*"); *Terry v. Protective Life Ins. Co.*, 717 F. Supp. 1203, 1205 (S.D. Miss. 1989) (comparing "the common test" set forth in *Donovan* with the "more restrictive approach" of *Taggart*).

New York Life tries to explain away these conflicts, arguing: (1) that *Taggart* purportedly did "not involve the issue of whether an *employer* has established an ERISA plan" (Brief in Opposition, p. 10, emphasis in original); and (2) that the Fifth Circuit followed *Donovan* in *Memorial Hosp. System v. Northbrook Life Ins. Co.*, 904 F.2d 236 (5th Cir. 1990) (Brief in Opposition, p. 9). Both attempts to explain away the conflicts are futile, for the reasons that follow.

First, *Taggart* did indeed involve both the issue of whether a multiple employer trust was an ERISA plan *and the issue of whether the employer established such a plan* by participating in the trust:

> While agreeing with [the court's conclusion that the multiple employer trust was not an ERISA plan] . . ., the Secretary of Labor urges us nonetheless to uphold federal jurisdiction in this case by declaring that Taggart Corp.'s *subscription to SMET* [the trust] itself "established a single employer welfare plan." . . . We reject this suggestion.

Taggart, 617 F.2d at 1211 (emphasis supplied by the court). Even the *Memorial Hospital* case cited by New York Life recognizes that *Taggart* involved this issue:

> We affirmed [the district court in *Taggart*], holding that "neither SMET . . . *nor Taggart's subscription to SMET* constitutes" [an ERISA plan].

904 F.2d at 242 (emphasis added). Thus New York Life is wrong in contending that the employer's establishment of an ERISA plan was not in issue in *Taggart*. The same issue was presented to the Sixth Circuit in this case, *i.e.*, whether the employer established an ERISA plan merely by purchasing insurance through its subscription to a multiple employer trust. The Sixth Circuit's reasoning and result in this case cannot be reconciled with the Fifth Circuit's decision in *Taggart*, and the Sixth Circuit acknowledges as much when it explains that it will follow *Donovan* instead of *Taggart*. (950 F.2d at 297, Appendix to Petition at 5a).

New York Life's second attempt to deny the existence of any conflict is similarly without merit. New York Life would have this Court believe that the Sixth Circuit's decision somehow does not conflict with the Fifth Circuit because the Fifth Circuit also followed *Donovan* in *Memorial Hospital, supra*. (Brief in Opposition p. 7, n.10). But New York Life ignores the fact that *Memorial Hospital* did not involve a small, entrepreneurial employer and that a different panel of the Fifth Circuit more recently followed *Taggart*, in *Gahn v. Allstate Life Ins. Co.*, 926 F.2d 1449, 1452-53 (5th Cir. 1991).[2] The reasoning and result in *Gahn*

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[2] New York Life's only discussion of *Gahn* is to suggest that

are directly in conflict with the Sixth Circuit's decision here.

A reading of *Taggart* and *Gahn* clearly demonstrates the conflict between the Fifth Circuit's decisions in those cases and the Sixth Circuit's decision in this one. The decisions below also fairly describe a conflict between *Taggart* and *Donovan*, which could have been avoided by the Sixth Circuit here but was not. New York Life, being unable to offer any reason why the Court should not grant certiorari to resolve these important conflicts, has instead tried to convince the Court that no conflicts exist.[3] This can only be done by disregarding or distorting the case law,[4]

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even though the state laws involved in that case survived preemption, somehow the state remedies did not. (Brief in Opposition, p. 11 n.15, p. 15 n.19). *Gahn* in fact states expressly the contrary: "The district court correctly held . . . that ERISA does not preempt Mrs. Gahn's [state] statutory *remedy*." 926 F.2d at 1454 (emphasis added).

[3] New York Life's broad statement that the "decisions below are consistent with the decisions of this Court and the regulations of the Department of Labor" (Brief in Opposition, p. 12), is similarly misleading on the subject of conflict. This Court has never decided a *Taggart* case, so there is nothing with which to be "consistent". And the Department of Labor regulations are "safe harbor" regulations; they do not answer the inquiry but merely *prompt* it if the "safe harbor" does not apply. *See Gahn*, 926 F.2d at 1452.

[4] New York Life takes nearly as much liberty with the procedural background of this case as it takes with the law when it represents to the Court that Petitioners did not argue below that the existence of an ERISA plan is a factual issue to be resolved upon a full record. (Brief In Opposition, p. 1 n.2). In their Brief filed July 23, 1990, with the Sixth Circuit, Petitioners stated, "*the existence of an ERISA plan is itself a question of fact*" (Brief for Appellees, p. 8, emphasis in original). The Sup-

and should not sway the Court from granting the Petition.

II. NEW YORK LIFE'S CONTENTION THAT A HEALTH INSURANCE ISSUE WHICH AFFECTS MILLIONS OF AMERICANS AND HAS BEEN UNANSWERED FOR ELEVEN YEARS IS NOT "SPECIAL" OR "IMPORTANT" MUST BE REJECTED.

It has been eleven years since this Court denied certiorari in the *Taggart* case and the issue has not gone away. As it recurs, it is one that affects potentially millions of Americans. "For the over 56 million Americans who are enrolled in group health insurance plans. . ., ERISA has become . . . a black hole." *Cathey v. Metropolitan Life Ins. Co.*, 805 S.W.2d 387, 392 (Tex. 1991) (Dogget, J., concurring), *cert. denied*, ___ U.S. ___, 111 S. Ct. 2855 (1991).

Even persons whose common law rights have not been swallowed up by the black hole of ERISA are affected in other ways by the issues presented in this case. Continued conflict among circuits and among the states[5] defeats the administration of justice gen-

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plemental Brief for Appellees filed November 28, 1990, in the Sixth Circuit stated at p. 2 n.2 that "the existence of an ERISA plan is itself a factual question which should be decided on a full record instead of by way of motion to dismiss or summary judgment." The Supplemental Brief for Appellees filed September 9, 1991, with the Sixth Circuit incorporated these earlier briefs by reference. And the same point was made to the district court both before the first appeal (Supplemental Memorandum Opposing Dismissal, p. 7) and upon remand (Memorandum on Remand, p. 19).

[5] New York Life concedes that state courts are split on this ERISA issue, but states simply that this "does not warrant granting certiorari in this case." (Brief in Opposition, p. 8 n.11).

erally. It is particularly ironic that the federal and state courts are being left to go in all different directions on an ERISA issue, the uniform application of that statute having been at the core of so many important decisions by this Court. *E.g.*, *FMC Corp. v. Holliday*, ___ U.S. ___, 111 S. Ct. 403, 411 (1990) (reaffirming the importance of employers not facing "conflicting or inconsistent state and local regulation") (citations omitted); *Ingersoll-Rand Co. v. McClendon*, ___ U.S. ___, 111 S. Ct. 478, 484 (1990)) (describing as "particularly disruptive" the "potential for conflict in . . . substantive standards applicable to the same employer conduct").

New York Life's contention that these issues are not "special" or "important" enough for the Court must be rejected. While New York Life might have quoted Rule 10 in saying that the factors listed therein are "neither controlling nor fully measuring the Court's discretion," it cannot seriously contend in this case that the factors are not met.

CONCLUSION

The Petition for a writ of certiorari should be granted.

The argument that the question is "factually based" is irrelevant, because the split is among courts deciding cases which are not meaningfully distinguished on the facts. It is unclear why such a split does not qualify as an "acceptable reason" to New York Life and is not even listed in its general discussion of Rule 10.1 (*see* Brief in Opposition at 4-5). As Rule 10.1(b) recognizes, the existence of conflicting decisions among the states on a federal question weighs in favor of certiorari. The issue involved in the present case has been the subject of such a conflict, as well as a conflict between federal circuits, and a conflict between federal courts and state courts of last resort, all as detailed in the Petition.

Respectfully submitted,

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